In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1704

MARTIN GOLDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy (18 U.S.C. 371) to violate the Travel Act, 18 U.S.C. 1952, in connection with a scheme to extort money from one Williams. He was acquitted on substantive counts charging that he caused Williams to travel in interstate commerce with intent to extort. The court of appeals affirmed *per curiam* (Pet. App. B).

Petitioner contends (1) that the indictment against him is invalid because it was founded on the hearsay reading of Williams' former testimony before another grand jury (Pet. 6-9); (2) that his conviction on the conspiracy count is insupportable in view of his acquittal on the substantive counts, which involved some of the overt acts alleged in the conspiracy (Pet. 9-13); and (3) that this Court's recent decision in *Rewis* v. *United States*, No. 5342, decided April 5, 1971, precludes his conviction since the purpose of the conspiracy was only a "single or sporadic use of interstate travel for illegal activity" (Pet. 13).

These contentions are insubstantial. An indictment is not invalid because based on hearsay evidence where, as here, the grand jury fully understands this circumstance and the witness is unavailable to testify. See *Costello* v. *United States*, 350 U.S. 359; *United States* v. *Braico*, 422 F. 2d 543, 545 (C.A. 7), certiorari denied, 398 U.S. 912; *United States* v. *Leibowitz*, 420 F. 2d 39, 41-42 (C.A. 2); *Jack* v. *United States*, 409 F. 2d 522, 523-524 (C.A. 9). Contrary to petitioner's assertion, there is no conflict among the courts of appeals on this issue.[1] As to petitioner's claim that the verdict is "fatally defective as inconsistent," any inconsistency in a jury's verdict would not require reversal. *Dunn* v. *United States*, 284 U.S. 390; *United States* v. *Carbone*, 378 F. 2d 420 (C.A. 2), certiorari denied, 389 U.S. 914. Moreover, as the

[1] In fact, petitioner's only real complaint concerns an asserted inconsistency within the Second Circuit itself (Pet. 8-9).

court below observed (Pet. App. B, p. 19), there was no necessary inconsistency, since some of the alleged conspiratorial acts were not included in the substantive counts. While petitioner challenges this observation as well, that challenge presents factual issues which were fully canvassed below and do not require further review in this Court.

The decision below was entirely consistent with *Rewis*. In *Rewis*, as the case went to the jury, all interstate contacts and travel were initiated by the patrons of a small betting establishment; this Court held that its proprietors, who themselves were not shown to have travelled interstate or used interstate facilities, could not be convicted on the basis merely that such contacts and travel by their patrons were forseeable. Slip op. at 5. Here, on the other hand, the jury could find that the conspirators themselves initiated interstate telephone conversations and traveled interstate in connection with the scheme; they actively encouraged interstate travel by the victim as well.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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